NO. 56379-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

YANIV LIVNAT,

Respondent.

Appeal from the Superior Court of Pierce County
The Honorable Debra Lynn Kiesel

No. 20-1-00858-5

REPLY BRIEF

MARY E. ROBNETT
Pierce County Prosecuting Attorney

PAMELA B. LOGINSKY
Deputy Prosecuting Attorney
WSB # 18096 / OID #91121
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 798-2913

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I. INTRODUCTION

This is a State's appeal from the trial court's entry of a CrR 8.3(b) order dismissing charges that arose from Yaniv Livnat's assault upon his 12-year-old son. Dismissal pursuant to CrR 8.3(b) requires both governmental misconduct and actual prejudice to the defendant's ability to receive a fair trial. Livnat concedes that governmental misconduct is lacking.

Livnat acknowledges that the dismissal was ordered in response to the child's mother's testimony and that both he and the trial court acquitted the State of any governmental misconduct. Although Livnat claims that arbitrary actions by "other people who play a role in the case"[1] can support a CrR 8.3(b) dismissal, he fails to identify a single case in which a CrR 8.3(b) dismissal was upheld based upon the conduct of a non-governmental actor. Livnat also fails to distinguish the precedent which holds a witness's improper testimony does not constitute governmental misconduct for purposes of double jeopardy.

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[1] Brief of Respondent at 28.

The trial court's order of dismissal must be reversed, and this matter must be remanded for a new trial.

II. ARGUMENT

While a trial court possesses the power pursuant to CrR 8.3(b) to dismiss charges, the exercise of this power requires a proper factual basis, governmental misconduct, and actual prejudice. The State's opening brief explained that all three required elements are missing in the instant case.

First, the trial court's factual basis for dismissal was not predicated upon what the jury actually heard, but what the trial court, based upon its knowledge of excluded evidence, construed the testimony to be. Second, after expressly finding that the prosecutor committed no misconduct, the trial court ruled that a civilian witness's conduct can satisfy the governmental misconduct prong of CrR 8.3(b). This ruling is contrary to existing case law that repeatedly rejects the notion that the conduct of such witnesses is properly attributed to the state. Third, the only identified prejudice that a mistrial (which the

defendant rejected) could not cure involved separate litigation over visitation, rather than the fairness of the current trial or a new trial.

The State of Washington will not repeat the above arguments in this reply brief. This reply brief will only deal with gaps in Livnat's arguments or with specific matters in his brief which seem in most urgent need of correction. The State's decision not to address certain arguments made by Livnat in his brief should not be considered as an acknowledgment of the validity of his analysis.

A. Dismissal Pursuant to CrR 8.3(b) Must Be Based on the Actual Record Rather Than on the Court's and the Defendant's Perception of the Record

The State assigned error to many of the trial court's findings of fact in support of the CrR 8.3(b) order. The State established that many of the findings, while consistent with Livnat's and the trial court's perception of the victim's mother's testimony, did not comport with the testimony the jury actually heard. *See* Brief of Appellant at 11-12, 16-17, 18-24, 36-45.

Livnat claims that the State's "complaints are either baseless, picayune, or ignore the deference this Court must use when reviewing the trier of fact's assessment of evidence." Brief of Respondent at 14-15. He urges this Court to ignore that he bore the burden of establishing the factual predicate in the trial court, and instead accept the trial court's credibility determinations. *Id.* at 12-13. But the bulk of the State's factual challenges do not involve credibility determinations; the dispute is over whether the jury ever received the information that the trial court relied upon.

Livnat does not identify what portions of the record refute the State's "baseless" complaints. He acknowledges, moreover, that the trial court used its superior knowledge to interpret "context," "pauses," and "emphases," to provide the linkage between Ms. Fernandez's PTSD reference and Livnat's prior assault that does not exist in the testimony the jury heard. Brief of Respondent at 16. Livnat does not, however, explain how the jury would be able to make the same leap of logic between the

immediately stricken reference to "he attacked me." 2RP 16, and the benign colloquial use of "PTSD" four questions later. 2RP 17.

The State concedes that some deference is owed to the trial court's determination regarding "intent." The record, however, does not support many of the predicate findings the trial court used to arrive at the conclusion that Ms. Fernandez's conduct was intentional. Specifically, the record reveals that Ms. Fernandez adjusted her behavior after receiving instruction from the court. *See* 2RP 37-40 (answering 13 questions with "yes," "right," or "uh-huh," after being told by the court to "try to answer as succinctly as you can"). The record demonstrates that in the interval between Livnat's last objection being ruled upon and subsequent to the court advising her to try to answer as succinctly as she could, 2RP 37, and Livnat's attorney telling Ms. Fernandez to "stop talking," Ms. Fernandez answered 12 questions in a row with "Uh-huh," "Right," or "Yes." See 2RP 37-38. She also provided a combination of single word

responses and multi-word responses to seven other questions. See 2RP 38-40. Finally, the record contains only one clear violation by Ms. Fernandez of a motion in limine.

The CrR 8.3(b) order of dismissal must be reversed as it was based upon the trial court's perception of Ms. Fernandez's testimony rather than upon the actual evidence heard by the jury.

B. Dismissal Pursuant to CrR 8.3(b) Was Improper as There Was No Governmental Misconduct

A dismissal pursuant to CrR 8.3(b) requires proof by the defendant of arbitrary action or governmental misconduct. *State v. Michielli*, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997). The trial court expressly found no misconduct by the prosecutor and ordered dismissal solely on the basis of a witness's conduct. CP 25, COL 3-4.

Livnat conceded in the trial court that no case law supported his proposition that a civilian witness's on-stand conduct will satisfy the "governmental misconduct" prong of CrR 8.3(b). 3RP 6, 15. In this Court, Livnat makes a general

statement that "actions by court administrators, police officers, and other people who play a role in a case" may justify dismissal pursuant to CrR 8.3(b). Brief of Respondent at 28. His argument in support of this statement, however, does not include citation to a single case in which a dismissal pursuant to CrR 8.3(b) was predicated upon the actions of a civilian witness or any other non-governmental actor. *See* Brief of Respondent at 28-38. When, as here, no authority is cited in support of a party's position, an appellate court may assume that none exists. *State v. Rawley*, 13 Wn. App. 2d 474, 482, 466 P.3d 784 (2020).

In an attempt to overcome the lack of favorable authority, Livnat speculates that perhaps the prosecutor did not effectively communicate the court's pretrial rulings to Ms. Fernandez. *See* Brief of Respondent at 32-35, 37-38. Livnat, however, did not assign error to any of the trial court's findings of fact or conclusions of law. The unchallenged finding, which is a verity

on appeal,[2] is that counsel for the State "appropriately advised Ms. Fernandez of the Court's orders." CP 22, FOF 3. This unchallenged finding is consistent with both the trial court's conclusion that the "prosecutor did not commit misconduct," CP 25, COL 4, and Livnat's admission in the trial court that the State properly advised Ms. Fernandez of the pre-trial rulings and did not intend, solicit, or even support Ms. Fernandez's on-stand conduct. 2RP 40, 41, 42, 48; 3RP 4-5.

The trial court's order granting Livnat's CrR 8.3(b) motion must be reversed, and this matter must be remanded for trial as there was no governmental misconduct. *See State v. Blackwell*, 120 Wn.2d 822, 832, 845 P.2d 1017 (1993) (where there is no showing of governmental misconduct, the trial court's dismissal of the case will be reversed).

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[2] *State v. Fletcher*, 20 Wn. App. 2d 476, 489, 500 P.3d 222 (2021).

C. Dismissal Pursuant to CrR 8.3(b) Requires Proof of Actual, Rather Than Speculative, Prejudice to the Defendant's Right to a Fair Trial

A dismissal pursuant to CrR 8.3(b) requires proof by the defendant that governmental misconduct (of which there is none in this case) prejudiced his right to a fair trial and that such prejudice cannot be remedied by granting a new trial. *State v. Rohrich*, 149 Wn.2d 647, 653-54, 71 P.3d 638 (2003); *Michielli*, 132 Wn.2d at 240. Prejudice to other interests, such as to the length of a possible sentence or the cost of multiple trials, that have no direct bearing on the fairness of an anticipated trial will not support dismissal of charges. *Rohrich*, 149 Wn.2d at 655-56.

In the trial court, Livnat took the position that a mistrial was not required based upon Ms. Fernandez's testimony. *See generally* 2RP 43, 48-49; 3RP 4; CP 24, FOF 12; CP 25, COL 10. He claimed that the striking of Ms. Fernandez's testimony was sufficient to preserve his right to a fair trial. 2RP 42, 48; 3RP 3-4. In this Court, he takes a contrary position, claiming that the striking of Ms. Fernandez's testimony or a mistrial were

insufficient to preserve his right to a fair trial. Brief of Respondent at 38-42. A defendant, however, who chooses to take his chances with the existing jury rather than move for a mistrial is not permitted to argue on appeal that the irregularities were critically prejudicial. *State v. Israel*, 113 Wn. App. 243, 290, 54 P.3d 1218 (2002).

The majority of Livnat's prejudice argument involves extra-courtroom matters that the supreme court held in *Rohrich* have no place in a CrR 8.3(b) analysis. *See* Brief of Respondent at 40-41 (expense of second trial and impact on visitation schedule in family law matter). The only "prejudice" Livnat claims would still exist in a new trial is that Ms. Fernandez would have no reason to follow the trial court's instructions if she "knew that the worst case scenario was that the prosecution may have to try the case again." Brief of Respondent at 40. But Livnat's argument is speculative at best and falls far short of his burden of establishing actual prejudice. *See Rohrich*, 149 Wn.2d at 657-58 (speculative prejudice to the accused's right to a fair

trial is insufficient to support the "extraordinary remedy" of dismissal under CrR 8.3(b)).

Dismissal of charges pursuant to CrR 8.3(b) is designed to deter the government from repeating misconduct. There was no governmental misconduct in this case. Dismissal of charges is not a response to a non-party, civilian witness's actions. A trial court has specific tools to deter a witness from provoking a mistrial or referring to excluded testimony. *See generally* RCW 7.21.010(b) (disobedience of any lawful order of the court is contempt). Livnat never asked that the trial court utilize these tools during the first trial.

Prior to a new trial, the court can, outside the presence of the jury, explain witness stand etiquette, the parameters of its pre-trial rulings, and the consequences Ms. Fernandez might face if she violates the rulings while on the witness stand. This information will familiarize Ms. Fernandez with her role, overcoming her inexperience as a witness. Accordingly, the

order dismissing this action pursuant to CrR 8.3(b) must be reversed.

D. Reversal of the Order of Dismissal Will Render Moot the Trial Court's Erroneous Striking of the Entirety of Ms. Fernandez's Testimony

A trial court may only strike a prosecution witness's entire testimony when the witness refuses to submit to cross-examination or refuses to answer pertinent questions. *See generally* 88 C.J.S. Trial, § 234 Deprivation of Cross-Examination (March 2022 Update) ("Where the opposing party, without fault on his or her part, is deprived of the opportunity of cross-examination, he or she is generally entitled to have the witness' direct testimony stricken on motion."). In the instant case, the State objected to the trial court's decision to strike Ms. Fernandez's testimony because Ms. Fernandez answered every single question that was posed to her on cross-examination. 2RP 43-46. Only after the trial court granted the motion to strike all of Ms. Fernandez's testimony did the State argue that this course

of action was a reasonable alternative to a mistrial. Compare 2RP 49 with 3RP 7-8.

Livnat contends that the State's acceptance of the court's decision to strike Ms. Fernandez's entire testimony and its argument that this action obviated the need for a mistrial prevents the State from raising the issue on appeal. *See* Brief of Respondent at 43-45. A party, however, does not waive its ability to appeal by taking efforts to mitigate an adverse ruling or by adjusting its conduct in recognition of the court's adverse ruling. *See, e.g., Lavigne v. Chase, Haskell, Hayes & Kalamon*, P.S., 112 Wn. App. 677, 681, 50 P.3d 306 (2002) (appellant did not waive its right to appeal by acknowledging that the trial court's adverse evidentiary ruling rendered summary judgment appropriate); *State v. Watkins*, 61 Wn. App. 552, 558, 811 P.2d 953 (1991) (a party does not waive review by introducing evidence in an effort to mitigated prejudice resulting from an adverse ruling).

Livnat's response to this portion of the State's appeal contains no citations to any legal authority. *See* Brief of Respondent at 43-45. His response does not acknowledge, much less distinguish the State's authorities. *Id.* Livnat's failure to provide any argument on the merits of striking Ms. Fernandez's testimony constitutes a concession that the ruling was improper. *See In re Cross*, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("Indeed, by failing to argue this point, respondents appear to concede it."); *State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) ("The State does not respond and thus, concedes this point.").

This Court need not reach the merits of the State's challenge to the striking of Ms. Fernandez's testimony if its opinion clearly states that the ruling does not prevent Ms. Fernandez from being called as a witness in a new trial. This Court may, nonetheless, choose to resolve the issue on the merits so as to prevent the error being repeated on remand and to provide future guidance to the lower courts regarding an issue

that, when it recurs, is likely to escape review. *See, e.g., State v. Gelinas*, 15 Wn. App. 2d 484, 488-490, 478 P.3d 638 (2020) (public interest exception to the mootness doctrine utilized to provide guidance to trial court judges regarding an issue that is likely to recur).

E. Livnat Waived His Right to Have the Jury Render a Verdict on His Guilt or Innocence by Moving to Dismiss Pursuant to CrR 8.3(b)

Livnat contends that the trial court's CrR 8.3(b) order of dismissal must be affirmed because a new trial would be barred by double jeopardy. *Brief of Respondent* at 45-49. Livnat argues that if the trial court erred by granting his motion to dismiss, retrial is barred because he opposed a mistrial. *Id.* Livnat's position is contrary to binding precedent.

When a defendant successfully seeks to avoid his trial prior to its conclusion by a motion to dismiss, the Double Jeopardy Clause is not offended by a second prosecution. *United States v. Scott*, 437 U.S. 82, 98-99, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978). A motion by the defendant to dismiss the case before

verdict on grounds unrelated to factual guilt or innocence is, just like a defense motion for a mistrial, "deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." *Id.* at 93-94.

Livnat affirmatively requested that his trial be terminated pursuant to CrR 8.3(b) before the jury reached a verdict as to his guilt or innocence. 3RP 4. Although Livnat claims he was goaded to do so by the conduct of Ms. Fernandez, a prosecution witness's testimony is not "prosecutorial misconduct" for purposes of double jeopardy. *See State v. Hopson*, 113 Wn.2d 273, 280-83, 778 P.2d 1014 (1989) (retrial not barred based upon the conduct of a State's witness). Double jeopardy presents no barrier to a new trial following this Court's reversal of Livnat's requested CrR 8.3(b) order of dismissal.

F. To Preserve the Appearance of Fairness This Matter Must be Remanded to a Different Judge

The State, citing the many similarities between Judge Kiesel's ruling and opinions in this case and those of the judge in *State v. Finch*, 181 Wn. App. 387, 328 P.3d 148 (2014),

requested that this case be remanded to a different judge. See Brief of Appellant at 60-64. Livnat's response to the State's argument does not refute the similarities between this case and *Finch*. In fact, Livnat does not even acknowledge the existence of *Finch*. *See* Brief of Respondent at 50-52.

A reasonable and disinterested person might easily believe that Judge Kiesel's preference for parent/child conflicts to be addressed in the family law arena rather than in criminal proceedings, *see* 4RP 4, adversely affected her ability to evaluate the evidence in a neutral manner. A belief that parent/child assaults do not belong in the criminal courts is contrary to long-standing state policy. *See, e.g.,* RCW 10.99.010 (Laws of 1979, ex. sess., ch. 105, § 1) (crimes occurring between cohabitants should be treated the same as crimes occurring between strangers); Laws of 1991, ch. 301, § 1 (law/safety/justice system must be part of an integrated system to prevent children who grow up in violent homes from becoming "the next generation of batterers and victims").

Livnat downplays Judge Kiesel's statements regarding a halftime motion, indicating that Judge Kiesel did not expressly indicate she would have granted such a motion. *See* Brief of Respondent at 51-52. The fact that Judge Kiesel was even awaiting a halftime motion after the victim graphically described Livnat grasping his neck to the point where he could not breathe,[3] coupled with the ER physician's findings of petechia around S.L.'s eyes and bruising on S.L.'s neck that were consistent with S.L.'s description of the assault,[4] would lead many a reasonably disinterested person to question whether both the State and Livnat would receive a fair trial on remand.

III. CONCLUSION

Dismissal of this case pursuant to CrR 8.3(b) was improper as there was no governmental misconduct. The order of dismissal must be reversed, and this matter must be remanded for a new trial.

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[3] 5RP 36-38, 41-45.
[4] 6RP 17-18, 21-22, 25-27, 30-31.

Livnat may be retried for the assault upon his son because he waived double jeopardy by requesting dismissal pursuant to CrR 8.3(b). Reassigning this case on remand to a different judicial officer will maintain public confidence that allegations of domestic violence will be adjudicated in proceedings that are fair to the defendant, the victim, and the State.

This document contains 3,112 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 19th day of October, 2022.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

s/ Pamela B. Loginsky
PAMELA B. LOGINSKY
Deputy Prosecuting Attorney
WSB # 18096 / OID #91121
Pierce County Prosecutor's Office
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 798-2913
pamela.loginsky@piercecountywa.gov

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10/19/2022	*s/Kimberly Hale*
Date	Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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